Supreme Court, U.S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1987

NEW ENGLAND INSURANCE COMPANY,
Petitioner,

vs.

INTERNATIONAL BANK OF MIAMI, N.A.,
Respondent.

On Petition for Writ of Certiorari to the District Court of Appeal of Florida, Third District

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

John H. Schulte
Counsel of Record
W. Barry Blum
TEW JORDEN & SCHULTE
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 371-2600

Counsel for Respondent,
The International Bank of Miami, N.A.

DESIGNATION OF CORPORATE RELATIONSHIPS

International Bancorp of Miami N.V.

International Bancorp of Miami, Inc.

Granvalour Holdings, S.A.

QUESTIONS PRESENTED

I.

WHETHER THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1257(3) TO REVIEW A STATE COURT JUDGMENT WHEN, IN THE STATE COURT PROCEEDINGS, THE PETITIONER NEVER CITED OR REFERRED TO THE FEDERAL CONSTITUTIONAL PROVISION RELIED UPON TO INVOKE THIS COURT'S CERTIORARI JURISDICTION

II.

WHETHER A DEFENDANT WHO ADMITTEDLY IS SERVED WITH PROCESS IN A STATE COURT PROCEEDING, BUT FAILS OR REFUSES TO DEFEND, MAY ARGUE THAT A DEFAULT JUDGMENT ENTERED AGAINST IT VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

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STATEMENT OF THE CASE

Petitioner New England Insurance Company ("New England Insurance") issued a directors and officers liability insurance policy (the "Policy") insuring the directors and officers of respondent The International Bank of Miami, N.A. ("International Bank"). The Policy required New England Insurance to pay

> any amount which the insureds are legally obligated to pay for a claim or claims made against them for Wrongful Acts and shall include but not be limited to damages, judgments, settlements and costs . . . and defense of legal actions, claims or proceedings and appeals therefrom.

International Bank brought suit in the Circuit Court for the Eleventh Judicial Circuit of Florida, in and for Dade County, and obtained a judgment for $4.6 million against the bank's former president, Frank Preve, Jr. ("Preve"), an insured under the Policy.

International Bank's complaint included a direct action against New England Insurance under the doctrine established in *Shingleton v. Bussey,* 223 So.2d 713 (Fla. 1969). *Shingleton* and its progeny hold that, under the public policy of Florida, an injured party is a third-party beneficiary of a liability insurance policy and may bring a direct cause of action against the insurer in a suit against the insured.[1]

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[1]Fla. Stat. § 627.7262 (1987), enacted in 1982, provides that a judgment against the insured is a condition precedent to a direct action against an insurer. However, causes of action accruing prior to October 1, 1982, as International Bank's did, are still governed by

New England Insurance was properly served with process in July 1984, but failed or refused to respond. The notice of service of process, the summons and the complaint were received by the chairman of New England Insurance, who forwarded it to a senior vice-president, the director of New England Insurance's claims department. The senior vice-president wrote on the process the word "New", the date, "7-18-84", and the name "Bill".

"Bill" was William P. Hutt, a senior claims supervisor, who wrote on the process the word "Priority" and underlined it twice. At New England Insurance, documents labeled "Priority" required a response before the summons and complaint were sent to clerical personnel for filing.[2]

Despite all of the foregoing, New England Insurance failed, or refused, to file or serve any paper in the action. A default was entered and, on April 30, 1986, a final judgment was entered against both Preve and New England Insurance in the amount of $4.6 million. The final judgment was amended on September 19, 1986, and the amended final judgment was received by New England Insurance on September 26, 1986.

New England Insurance did not appeal from the amended final judgment. Instead, on November 19, 1986, New England Insurance served in the Florida trial court a motion for relief from final judgment and to vacate

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Shingleton. See VanBibber v. Hartford Accident & Indem. Co., 439 So.2d 880 (Fla. 1983).

[2]Additionally, both prior to and after New England Insurance was served with process, it was notified of the action by four different law firms. It received from the law firms several copies of the complaint naming it as a defendant, as well as a copy of the entire court file.

default under Florida Rule of Civil Procedure 1.540(b)(1) and (3). After several evidentiary hearings, the trial judge determined that New England Insurance was not entitled to relief and denied the motion. New England Insurance then filed a motion for rehearing which, after a hearing, also was denied.

New England Insurance appealed the trial court's order denying its Rule 1.540(b) motion to the District Court of Appeal of Florida, Third District. In neither the trial court nor the court of appeal did New England Insurance argue that the Florida procedure regarding defaults and default judgments violates the due process clause of the fourteenth amendment to the United States Constitution.

Following briefing and oral argument, the court of appeal affirmed the trial court's ruling. *New England Ins. Co. v. International Bank of Miami, N.A.*, 514 So.2d 390 (Fla. Dist. Ct. App. 1987). It was only after the court of appeal's decision that petitioner, having failed in its state law arguments, developed the federal due process argument presented in its petition for writ of certiorari.

SUMMARY OF ARGUMENT

This Court has no jurisdiction to grant a writ of certiorari because petitioner never raised, presented or preserved below the federal claim put forth as the basis for certiorari. Petitioner never once cited the fourteenth amendment in the state court proceedings. The Florida court of appeal's opinion did not pass upon a federal due process question. Petitioner's arguments below were based entirely upon state law procedural and factual claims. Because no federal claim was presented or pre-

served below, this Court is without jurisdiction over this case.

Moreover, petitioner was afforded due process. Petitioner admittedly was served with process, but failed or refused to appear in the case and defend. It cannot now argue that its own failure or refusal to respond to the notice and opportunity to be heard was somehow a denial of due process.

Finally, the issue petitioner brings to this Court is purely a state law question. The Florida courts correctly determined that, under Florida law, the damages against petitioner were liquidated and petitioner was not entitled to additional notice of a hearing on damages. Petitioner improperly asks this Court to review that issue of state law.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION OVER THIS CASE BECAUSE PETITIONER FAILED TO RAISE OR PRESERVE A FEDERAL DUE PROCESS CLAIM IN THE STATE COURT PROCEEDINGS

This Court consistently holds that it will not decide federal constitutional issues that were not raised, preserved or ruled upon in the state court proceedings below. *Webb v. Webb,* 451 U.S. 493, 498-99 (1981); *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969). In this case, petitioner never raised in the state courts any claim based upon the fourteenth amendment to the United States Constitution. This Court thus should deny the petition for writ of certiorari for want of jurisdiction.

Petitioner's assertion that "[t]he record as a whole shows that Petitioner's federal claim was presented and

considered in the state court" (Petition at 6-7) is incorrect. In all the papers petitioner filed below attacking the judgment entered against it,[3] petitioner never once cited or mentioned the fourteenth amendment, the United States Constitution, or a decision of this Court. In fact, petitioner used the words "due process" in its papers only five times, and never in reference to the United States Constitution. Three of those five references were to a passage, quoted three different times, from a Florida case, *Bowman v. Kingsland Development, Inc.*, 432 So.2d 660, 663 (Fla. Dist. Ct. App. 1983), that does not involve the fourteenth amendment, but rather Florida Rule of Civil Procedure 1.440(c).

In *Webb v. Webb*, 451 U.S. 493 (1981), petitioner sought certiorari by attempting to raise a federal claim under the full faith and credit clause, U.S. Const. art. IV, § 1. *Id.* at 494. The petition alleged that the federal question had been raised properly in the state courts. This Court dismissed the petition explaining:

> Although petitioner did use the phrase "full faith and credit" at several points in the proceedings below, nowhere did she cite to the Federal Constitution or to any cases relying on the Full Faith and Credit Clause of the Federal Constitution. . . .

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[3]The papers filed by petitioner were: (1) a verified motion for relief from final judgment and to vacate default; (2) a renewed and/or amended Rule 1.540(b) motion for relief, etc.; (3) a motion for rehearing on defendant's motion for relief from final judgment; (4) appellant's main brief; (5) appellant's reply brief; and (6) a petition for rehearing.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. *New York ex. rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 (1897). Petitioner argues that since the Georgia Constitution has no full faith and credit clause, there can be no doubt that the above references in the record were to the Federal Constitution and therefore that her federal claim was properly presented. . . . We are unpersuaded. In fact, we find it far more likely that petitioner was referring to state law.

451 U.S. at 496-97.

Similarly, in the instant case, petitioner's occasional and incidental uses of the term "due process", with no reference ever to the United States Constitution or any case relying on the fourteenth amendment, make it clear that no federal claim was adequately presented below.[4]

The Court in *Webb* also observed that "nowhere in the opinion of the Georgia Supreme Court is any federal question mentioned, let alone expressly passed upon." *Id.* at 495. In such circumstances, this Court assumes "that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court

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[4]The Florida state constitution *does* have a due process clause, Fla. Const. art. I, § 9, which was a possible basis of petitioner's "due process" references.

can affirmatively show the contrary." *Id.* (quoting *Street v. New York*, 394 U.S. 576, 582 (1969)).

In this case, the Florida court of appeal's opinion does not pass upon any federal due process issue and no case cited by the court of appeal involves a federal due process claim. 514 So.2d 390.

No federal claim having been presented or preserved below, either expressly or by clear implication, this Court must deny the petition for writ of certiorari.

II. PETITIONER WAS AFFORDED THE NOTICE AND OPPORTUNITY TO DEFEND CONTEMPLATED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

Due process requires that a party be afforded "notice and opportunity for a hearing". *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). It does not require that a defaulting defendant actually seize upon that opportunity. *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). If a defendant is served with process and has notice of a lawsuit against it, as New England Insurance admittedly did here (Petition at 4), but fails or refuses to defend, it cannot be heard to complain that it was denied due process. *Id.; cf. National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 315 (1964) ("Since the [defendants] did in fact receive complete and timely notice of the lawsuit pending against them, no due process claim has been made").

As this Court stated in *Boddie:*

> Due process does not, of course, require that the defendant in every civil case actually have a hearing

> on the merits. A State can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance
> . . . .

401 U.S. at 378.

Here, New England Insurance was afforded notice and opportunity for a hearing consistent with due process requirements. It was served with process, and several senior officers in its claims department reviewed and discussed the process. New England Insurance failed to respond. This is not a case where property was seized or a judgment entered without prior notice. *See, e.g., Peralta v. Heights Medical Center, Inc.*, 56 U.S.L.W. 4189 (U.S. Feb 24, 1988).

Because New England Insurance was validly served with process, there was no denial of due process by the entry of the default judgment. Moreover, petitioner was afforded and participated in three hearings in the trial court, as well as a full hearing before the district court of appeal. Its belated effort to elevate to constitutional status its disagreement with the Florida courts' interpretations of Florida law is misguided. The petition for writ of certiorari should be denied. *Boddie*, 371 U.S. at 378.

III. THE ISSUE PRESENTED BY PETITIONER INVOLVES ONLY STATE LAW, AND THE FLORIDA COURTS CORRECTLY APPLIED THAT LAW

Petitioner's claim of entitlement to notice of a hearing on damages is purely a matter of Florida state procedure. Historically, a defaulted defendant in Florida had no right to any notice of a hearing on damages, even when the damages were unliquidated. *Stevenson v. Arnold*, 250

So.2d 270, 271-72 (Fla. 1971). Effective January 1, 1977, however, Florida Rule of Civil Procedure 1.440(c) was amended to require that "[i]n actions in which the damages are not liquidated, the order setting an action for trial shall be served on parties who are in default in accordance with Rule 1.080(a)." *Compare In re The Fla. Bar: Rules of Civil Procedure,* 339 So.2d 626, 629 (Fla. 1976) *and In re The Fla. Bar: Rules of Civil Procedure,* 265 So.2d 21, 40 (Fla. 1972). In reality, the issue presented in the petition for certiorari is whether the Florida courts properly interpreted Florida Rule of Civil Procedure 1.440(c).

In this case, the courts below correctly determined that, under Florida law, the damages awarded against New England Insurance were liquidated and that petitioner, being in default, was not entitled to notice of a hearing on damages. Under Florida law, damages are liquidated when the amount may be ascertained with exactness from the cause of action as pleaded. *Bowman v. Kingsland Dev., Inc.,* 432 So.2d 660 (Fla. Dist. Ct. App. 1983).

International Bank's cause of action against New England Insurance was a direct action founded upon *Shingleton v. Bussey,* 223 So.2d 713 (Fla. 1969). International Bank, as a third-party beneficiary of the Policy under Florida law, was entitled to recover from New England Insurance the amount of any judgment entered in International Bank's favor and against one of New England Insurance's insureds. International Bank secured a judgment against Preve, New England Insurance's insured, for $4.6 million and, under Florida law, was entitled to a judgment against New England Insurance for that same exact amount.

Petitioner's suggestion that there exists a Florida rule automatically "liquidating" damages upon default (Petition at 10) is absolutely incorrect. There is a plethora of Florida authority providing that when damages are unliquidated, Florida's rules of procedure require notice of a hearing on damages even though the defendant is in default. *See, e.g., Calder v. McNess,* 427 So.2d 393 (Fla. Dist. Ct. App. 1983); *Tallman Pools of Georgia, Inc. v. Wood,* 399 So.2d 112 (Fla. Dist. Ct. App. 1981).

Here, under a specific provision of Florida law, the direct action claim permitted by *Shingleton,* the damages against New England Insurance were liquidated by the judgment against its insured, Preve. It was the judgment against Preve, New England Insurance's insured, not New England Insurance's default, that "liquidated" International Bank's damages against New England Insurance.

The Florida court of appeal's reference to *Shingleton* demonstrates that its decision was founded upon that determination of Florida law. This Court, of course, must accept the state court's construction of controlling Florida law and its application to the state's default procedures. *Coleman v. Alabama,* 399 U.S. 1, 9 (1970); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.,* 360 U.S. 684, 688 (1959).

The instant petition does not present a viable federal due process issue. Rather, petitioner in effect asks this Court to review the state court's interpretation and application of Florida law and the Florida Rules of Civil

Procedure. That request is not a proper basis for certiorari review by this Court.

CONCLUSION

For the foregoing reasons, New England Insurance's petition for writ of certiorari to the District Court of Appeal of Florida, Third District, should be denied.

Respectfully submitted,

John H. Schulte
Counsel of Record
W. Barry Blum
TEW JORDEN & SCHULTE
701 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 371-2600

Counsel for Respondent,
The International Bank of Miami, N.A.